No. 840.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY,
AND
BRITISH COLUMBIA YUKON RAILWAY COMPANY,
Defendants in Error.

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF DEFENDANTS IN ERROR.

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STATEMENT OF FACTS.

We are quite content with the statement of facts of plaintiff in error, except that in some places it is very brief, and a reference to and reading of the record is necessary to get a complete understanding of the issue.

ARGUMENT.

I.

FIRST ASSIGNMENT OF ERROR.

1.

The first assignment of error relates to plaintiff's motion to remand the case to the state court. This question was argued at length before Judge Hanford, and his able, exhaustive and well-considered decision is found on page 19 of the Transcript of Record. At that time, after the argument, we submitted a brief to Judge Hanford, and believe that we can best present the question now by setting forth that brief, which is as follows:

In this cause the plaintiff is a resident and citizen of the State of Washington, and the defendant corporations are citizens respectively of West Virginia and British Columbia. It is conceded that if this case were one against either of the defendants singly there would be no question about the defendants' right to remove. Then the question at issue is: Can defendants, one an alien, and the other a citizen of a State diverse from the plaintiff, remove the cause?

Plaintiff cites as authority Par. 68 of Black's Dillon on Removal. On page 95 the author uses this remarkable language:

"The language of the constitution and of the removal act, 'a controversy between citizens of a state and foreign states, citizens or subjects,' applies only to cases where all the parties on one side of the controversy are

citizens of one of the states and all the parties on the other side of the controversy are aliens."

To substantiate this remarkable conclusion the author cites Hervey vs. The Illinois Midland Railway Co., et al., 7 Bissell, 103. A careful perusal of the opinion in this case discloses that the controversy was between the plaintiffs, residents of the State of Illinois and aliens, and defendants, residents of the State of Illinois and aliens. One sentence in the opinion is interjected which might give the author some hope in his assertion, but it was not the question before the court. No one contends but that the conclusion reached in the Hervey case is correct.

Another case cited is that of the Merchants' Cotton Press Company against Insurance Co., et al., 151 U. S. 368. There the defendants were residents of the State where the suit was brought, of other States in the Union, and of foreign countries. The author also cites King vs. Cornell, 106 U. S. 395. In that case, the plaintiff, a citizen of New York, sued a citizen of the same State, and an alien subject of Great Britain. Held, of course, that removal could not be had.

Tracey vs. Morel, 88 Fed. Rep. 801, quotes Black's Dillon, but the controversy there was that between plaintiff and defendants, citizens of the same state, and another defendant, an alien.

So far as we have been able to discover authorities the question in point has not been decided. Several times the courts have laid down principles which help to determine this controversy.

In the famous Sewing Machine Companies Cases, 18 Wall. 553, commented upon at length by the editor in 12 Am. Reports, 545, the following doctrine is laid down:

"These expressions in the act of congress where an alien is a party, or the suit is between a citizen of a state where the suit is brought and a citizen of another state, says Marshall, Ch. J., the court understands to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts; or, in other words, that where the interest is joint, each of the persons named in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed. Strawbridge, et al., vs. Curtis, et al., 3 Cranch 267. Connolly vs. Taylor, 2 Pet. 564; Curtis Com., par. 75."

And again, p. 546,

"Corporations, it is true, are now regarded by this court as inhabitants of the state by which they are created and in which they transact their corporate business, and it is also held that a corporation is capable of being treated as a citizen for all purposes of suing and being sued in the circuit court, but the rule as modified in that regard does not diminish the authority of those cases as precedents, to show that by the true construction of the judiciary act it requires that each of the plaintiffs, if the interest be joint, must be competent to sue each of the defendants in the circuit court to sustain the jurisdiction under the 11th section of that act. Marshall vs. Railroad, 15 How. 325; Railroad vs. Wheeler, 1 Black 295; Drawbridge Co. vs. Shepherd, 20 How. 227; S. C. 21 id. 112; Coal Co. vs. Blatchford, 11 Wall. 172."

In Creagh vs. Equitable Life Insurance Society, 83 Fed. R. 849, the following doctrine is announced (p. 851):

"The right of removal is given to a defendant who is a non-resident of the state in which the action is commenced, whether said defendant be an alien or a citizen of another state."

This construes the act of 1887, amended in 1888, regarding the removal of causes.

After the word "sustained" 4th line, 4th st.
cite,
Virginia Carolina Chemical Co. vs. Sur
108 Fed. 453

[illegible] will be sustained. The plaintiff could have sued the defendants direct in the circuit court; in fact it is a common practice in the great railway foreclosure suits to join foreign (alien) and domestic (formed in any state) corporations in suits originally brought in the circuit court.

This whole question was ably argued by plaintiff's counsel before, and carefully considered by, the learned Judge in the Superior Court. The conclusion there reached was that, as plaintiff had the right to sue in the circuit court in the first instance and sustain jurisdiction, the right of removal was unquestioned. To take any other view would give rise to serious abuse of the statute.

A plaintiff bringing suit, and desiring to prevent removal, need only to join an alien with the real party in interest and when the suit is tried on the merits let judgment be rendered in favor of the nominal defendant with

a penalty only of the costs to this defendant in the action. In enacting the law Congress evidently intended that the merits of the law should be enforced and that technical conclusions should never be adopted in construing the act.

Section 1 of the Act of August 13, 1888, amending the Act of 1887 (Supplement U. S. Statutes, Vol. 1, 2nd ed., 1874-1891) provides that the circuit court shall have original jurisdiction in suits in which there shall be a controversy between citizens of different states * * * or between citizens of a state and foreign states, citizens or subjects, etc.

The different persons are connected by "or," but it seems clear that that would be construed as meaning "and" when different parties coming within the rule are joined as defendants; that is, if a citizen of a different state and an alien are joined as defendants then the "or" would read "and." This is further strengthened by the second paragraph of Sec. 2, which is as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper District by the defendant or defendants therein, being nonresidents of that state."

This last quotation is an addition to the old removal acts. It would seem that Congress contemplated that a citizen of a different state from the plaintiff and an alien

might be joined as defendants, and they therefore used the plural and added "being non-residents of that state."

A proper, just, and liberal construction of the statute cannot be had if the unsupported rule laid down by Black is to govern.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or absurd conclusion.

Lau Ow Bew vs. U. S., 144 U. S. 47.

A statute must be construed so as to carry out the intent of the legislature with reason and discretion, though such construction may seem contrary to the spirit of the statute.

U. S. vs. Buchanan, 9 Fed. R. 689.

Statutes should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it.

Bernier vs. Bernier, 147 U. S. 242.

All former statutes on the same subject, whether repealed or unrepealed, may be construed in considering provisions that remain in force.

Viterbo vs. Friedlander, 120 U. S. 707.

A law is the best exposition of itself; every part of an act is to be taken into view for the purpose of discovering the mind of the legislature.

Pennington vs. Coxe, 2 Cranch 33.

If in a subsequent section of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing the phrases.

Alexander vs. Alexandria, 5 Cranch 1.

It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word, and every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.

Washington M. Co. vs. Hoffman, 101 U. S. 112.
Platt vs. U. P. R. R. Co., 99 U. S. 48.

If a literal interpretation of any part would operate unjustly, or absurdly, or contrary to the meaning of the act, it should be rejected. The construction must be such that the whole can stand, if possible.

Heydenfeldt vs. Daney G. & S. Mining Co., 93 U. S. 634.

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over the letter.

U. S. vs. Kirby, 7 Wall. 482.

2.

Recurring now to the brief of plaintiff in error we find that the only authorities cited that are not fully covered in the opinion of Judge Hanford, and shown by the above to have no application, are the following:

In Rooker vs. Crinkley, 18 S. E., it seems that the reason for refusing to remove was that the alien was a resident of the State, although the opinion is so brief that it is not clear just what the North Carolina Court did de-

cide in this case. However the Court may have had under consideration Section 2 of Act of August 13, 1888 *supra,* and found that the defendant (an alien) not "being a non-resident of the state," was properly sued in the state court. If he came there to reside, and not as a convenience to carry on business, he must submit to the state courts' jurisdiction. This rule is well known and seems right, but has no application to the case at bar.

Counsel likewise cite 33 Fed. 897, 28 Cal. 97, 20 Cal. 167, 4 Cal. 203, 30 Mich. 453, but with what force we are at a loss to understand, for in each of these cases one of the defendants at least was a resident and citizen of the same state with the plaintiff, and in such cases no one doubts the soundness of the ruling which thus construes the statute. Citizenship of *all* defendants must be diverse to plaintiff, else removal is denied. Further, all of these cases, except the 33 Fed., construe the statute as it existed previous to the amendments of 1875 and the amendments again of 1887-1888. These state authorities are therefore without point because they construe a law which has been changed by amendment, the amendment being in force so far as the case at bar is concerned.

Counsel for plaintiff lay considerable stress upon the case of King vs. Cornell, 106 U. S. 395, and we desire to call the court's particular attention to the comment thereon by Judge Hanford in his decision on this question. In this case one of the defendants was a resident of the same state with the plaintiff, and the only support that the

plaintiff in this cause derives from the decision is the mere dicta of the court, and as such it should not control the decision of this court.

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens vs. Virginia, 6 Wheat. 264, and cited approvingly in U. S. Insular cases, 182 U. S. 258.

3.

Next counsel contend that the amendment to the petition for removal was made too late. To answer this unsupported assertion we beg to call the Court's attention to the cases cited on this point herein and to those relied upon in the opinion of Judge Hanford.

4.

Then again counsel claim that the petition is faulty in that it does not fully or completely enough disclose the incorporation of the alien corporation. They say it must show that at the *time* of the institution of the suit the alien was a corporation, citing again Black's Dillon and following add: "The right of removal must be determined

by the pleadings at the time the petition is filed." This ground was urged when the case was before the state court. The learned judge then himself answered that by saying that if it was not clear in the petition that the alien was a corporation at the time the suit was instituted it was so stated in the complaint and plaintiff could not be heard to dispute his own allegations.

Further the plaintiff in error has no well-considered authority to sustain his technical grounds to the petition for removal. The only authority cited by the plaintiff is Black's Dillon, Removal of Causes, Sec. 171 (erroneously cited in plaintiff's brief as Sec. 181), and in this very section the author uses the following language:

"It is true the record in the case may be looked to in aid of the petition, and that the Federal Court will not be obliged to remand the case on account of defective averments of citizenship in the petition if the record affirmatively shows diversity of citizenship."

The same doctrine is laid down in the case of Steamship Co. vs. Tuggman, 106 U. S. 118, where Mr. Justice Harlan uses the following language:

"It is not always necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met, if the citizenship of the parties to the controversy sought to be removed is shown affirmatively by the record of the case."

In the case at bar the complaint sets out fully these facts and shows the diverse citizenship of the parties both at the time the cause of action accrued and at the time

the action was commenced. The same doctrine is laid down in Railway Co. vs. Ramsey, 22 Wall. 322; Robertson vs. Cease, 97 U. S. 646.

When the matter came up before the Superior Court defendant, under leave of the Court, amended his petition by inserting the words "was and." According to the authorities such an amendment may be allowed even after the case comes before the Federal Court. In the case of Tremper vs. Schwabacher, 84 Fed. 415, it was held that where the jurisdictional facts are stated in an imperfect manner in a petition the Federal Court may allow amendments for the purpose of making a good record. The opinion in this case is so exhaustive and the facts and circumstances so nearly identical with the case at bar that it is wholly unnecessary to cite further authorities.

Moreover such an amendment is unnecessary, as shown in

Dodge v. Tulleys. 144 U. S. 456, and
Shaw v. Quincy Mining Co., 145 U. S. 444-453,

which cases are cited and relied upon by Judge Hanford in his opinion.

In the light of all the authorities cited above we confidently assert that the Circuit Court has jurisdiction and the case should not be remanded.

II.

SECOND ASSIGNMENT OF ERROR.

5.

Plaintiff's second assignment of error relates to the introduction of defendants' exhibit No. 2, and the testimony of L. H. Gray in connection therewith. The causes which led to the introduction of this testimony are as follows: The alleged contract sued upon by the plaintiff was embraced in two letters, plaintiff's exhibits A and B, which were referred to in paragraph 5 of the complaint, and copies thereof furnished defendants upon demand, and numerous conversations between Gray and plaintiff at Seattle, Skaguay, and elsewhere. Both sides were given large latitude, for the court wanted to determine whether there was any contract.

The plaintiff was not restricted to the letters, exhibits A and B, but was allowed to introduce oral evidence to prove, if possible, whether there was a contract or not between the parties. It was for this reason only, viz., to prove whether or not there was any contract, that the court allowed the introduction of defendants' exhibit No. 2. If there was any error in the introduction of this exhibit, we contend that it was cured by the testimony of L. H. Gray (page 15 of plaintiff's brief) that the proposition of plaintiff was not accepted. Under such circumstances, of course, there could be no recission or modification of the contract. Moreover, the Court expressly charged the jury (Transcript of Record, pp. 46, 47 and

48) that they should not consider this exhibit as a recission or modification of the contract, in the event that they found that a contract existed. Nothing can be clearer than the Court's instructions and no one could complain unless it was the defendants. It certainly did not in any way injure the plaintiff.

We also contend that if there was error in the introduction of the testimony of Witness Gray it is not reviewable in this Court, because the testimony is not made a part of the transcript of record. C. C. A. Rule 11, 80 Fed. 228.

It is unnecessary to cite the innumerable authorities which hold that error in admitting testimony is harmless, unless it appears to have been prejudicial to the party complaining. Furthermore, the error, if there was error, was cured by the instructions of the Court.

The judgment of the Court below will not be reversed because of the erroneous admission of evidence when the record shows that such evidence was so explained in the instructions of the Court to the jury that it worked no prejudice to the appellant.

Cadman vs. Markle, 43 N. W. 315, 5 L. R. A. 707.
Seeley vs. Garey, 109 Pa. St. 301.

Error in admission of evidence that becomes immaterial under an instruction is not ground for complaint.

Wreggitt vs. Barnett, 99 Mich. 477.

The admission of immaterial evidence is harmless when the instructions to the jury have clearly indicated

that it could not be considered upon the only question as to which its admissions might do harm.

Sunset T. & T. Co. vs. Day, 70 Fed. 364, 44 U. S. App. 58.

We believe that a careful consideration of the facts and the law will leave no doubt that the introduction of Exhibit 2 was proper and constituted no error.

III.

THIRD ASSIGNMENT OF ERROR.

6.

The third assignment of error relates to the refusal of the Court (not defendants' objection to the question) to allow the introduction of testimony of the witness Hester, but counsel discuss at length defendants' objection only. The Court's ruling does not appear in the bill of exceptions nor in the record, but defendants' objections appear only. It was the Court's ruling (not defendants' objection) that prevented the answer. Then how can this Court determine whether the answer would have availed? It is a well-known rule, without exception that before one can avail himself of the Court's error, if error, in refusing the answer to a question, that the party ruled against must then make his offer. Failure to do this is fatal. Plaintiff made no offer. There is therefore no available error. This rule is laid down in Thompson on Trials, Sec. 678, where the author among other things says:

"Where there is in the bill of exceptions neither a formal offer of evidence, nor any statement of what the witness will testify to, there is no available error."

State vs. Lewis, 22 Pac. R. 244.

The contention of plaintiff is that the grounds offered by defendants in support of this objection are not valid, and cites in support of this contention several sections of Thompson on Trials. We fail to see what bearing these sections can have upon the point at issue, since the objection of defendants was sustained by the Court and they are not seeking to avail themselves of an error on appeal. In fact, the latter part of Sec. 698 of Thompson on Trials cited by plaintiff's counsel sustains us and is against the position of plaintiff. Defendants are quite satisfied. If plaintiff is not, let him bring before this Court the Court's error.

On page 18 of their brief counsel for plaintiff give what would be valid grounds for the Court's action. That might have been the grounds for the Court's action, if his ruling were known.

Plaintiff is evidently seeking to avail himself of an error of the defendants' counsel and not an error of the Court, since the ruling of the Court is not made part of the record and is therefore not reviewable in this court.

Arambula vs. Sullivan, 16 S. W. 436.
State vs. Lewis, 22 Pac. Rep. 241.
Jones, et al., vs. Currier, 22 N. W. 663.
Bowen vs. Pollard Admrs. 71 Ind. 177.

After citation page 17 add:
Dresser vs. C. P. N. Co. 116 Fed. 281 (285).

Plaintiff admits that there was a valid reason for not admitting this testimony, viz., that it impeached the testimony of the witness Powell. There was clearly no error of the Court in rejecting this testimony.

The Charles Morgan, 115 U. S. 69.

7.

We submit that the plaintiff in error has failed to show affirmatively that there was error in the rulings of the Court below. The verdict was a general one for the defendants in error. The presumption therefore is in their favor, and we believe that this Court will not disturb that verdict upon such an incomplete presentation of the case as is made by the transcript of record which has been filed herein. The record of the testimony is so incomplete that it would be impossible to determine intelligibly whether the rulings were correct or not, even if they had been fully set out, but the record fails not only to set out the testimony but also the grounds for the Court's ruling, and it must therefore be merely a matter of conjecture as to what the testimony was, and what was in the mind of the Court in passing upon it.

With full confidence in the rulings of the lower court, this case is

Respectfully submitted,

JOHN P. HARTMAN,
Attorney for Defendants in Error.